Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

M.A. EVERETT, *et al.*,

Petitioners,

v.

USAIR GROUP, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision denying jurisdiction is contrary to *Pennsylvania R.R. v. Day*.

Whether petitioners were required to formally join the union for a violation of its duty of fair representation for the district court to have jurisdiction.

Whether petitioners were denied their due process rights to have their dispute decided by an impartial tribunal by imposing the requirement under the Railway Labor Act that their retirement benefits be determined by an arbitration panel selected by the company and the union that no longer represents most of the individual petitioners.

Whether a retired pilot, no longer represented by the pilots' union, is an "employee" under the RLA.

LISTING OF PARTIES AS TO PROCEEDING

Plaintiffs/Petitioners:

M. A. Everett, *et al.* (*See* Appendix D, 26a).

Defendants/Respondents:

USAirways, Inc.

USAirways Group Inc.

Retirement Income Plan for Pilots of USAir.

There were no other interested parties in the district court below, and petitioners are aware of no intervenors or amicus curiae before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Four hundred-fifty retired pilots and fifty currently employed pilots for USAirways Corporation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The written opinion of the United States District Court for the District of Columbia, issued on May 31, 1996, determined that arbitration was mandatory under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "RLA"), and dismissed Counts I and III for lack of subject matter jurisdiction. The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court decision was filed on February 19, 1999.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

45 U.S.C. § 151. **Definitions; short title**

. . .

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an

employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

45 U.S.C. § 351. **Definitions**

For the purposes of this chapter, except when used in amending the provisions of other Acts —

(d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. . . .

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. The Decision On Dismissal

The District Court's jurisdiction was based on 28 U.S.C. § 1331 and 29 U.S.C. § 1001. The court found it had jurisdiction over Count II, which alleged a violation of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1022, *et seq.*, but stayed proceedings on that count until the end of the arbitration process to which petitioners were relegated by the court's dismissal of Counts I and III. The opinion is published at 927 F. Supp. 478, 482 (D.D.C.).

B. The Appellate Decision

The United States Court of Appeals for the District of Columbia decided that because the union was not made a party to the case, that jurisdiction was not appropriate and that there was no jurisdiction based on the district court's opinion. That decision was not published but is found at App. A, *infra.*

C. The Underlying Facts

This case involves the meaning of a short, but significant phrase — "unadjusted for dividends" — and which tribunal can decide whether nearly 450 retired and active airline pilots receive over $80,000,000 in retirement benefits. A constant theme of USAir is that the terms "unadjusted for dividends" has been uniformly intended to mean, from 1972 to the present, that "unadjusted for dividends" excludes dividends from the S & P 500 index upon which the Prior Plan minimum benefits calculations is based. Actually, USAir, solely to advance its economic purposes, changed the concept of the performance of the S&P 500 Stock Index with reinvested dividends to the performance exclusive of dividends. An examination of the facts in the record demonstrate that this proposition is wrong and was recently fabricated.

The parties to the 1972 Collective Bargaining Agreement knew that dividends and interest had been accumulated through reinvestment in an actual stock pool. They were told by USAir that their retirement benefits would be no less than that provided for in the earlier plan and, therefore, they understood that the S&P 500 Index (with dividends reinvested) would have to apply if the new benefit were to be no less than the old.

The 1973 Plan Amendment provided that a participant's retirement income under the new Plan:

> [s]hall not be less than that to which a[participant] would have been entitled at his Retirement . . . assuming . . . that had the Variable Retirement Income Plan remained in

> effect, the investment performance there under would be equal to the investment performance of the Standard & Poor's 500 Stock Index **(unadjusted for dividends)** . . .

That this Amendment required that dividends be included is confirmed by CIGNA's 1973 letter to Allegheny, which documented the fact that the Prior Plan minimum benefits were to be calculated the same as the minimum benefits under the Delta Plan.

In 1977, USAir used the S&P 500 index *with dividends included* in evaluating the effect of the new plan. Mr. Dyer, by then Treasurer of USAir and formerly of Connecticut General wrote a memo in which he discussed the performance of the phantom plan and the S&P 500 stock index. He stated that the performance of the fund management by USAir (under the new plan) was down about 20%, but that the S&P 500 was up 37.2%, which is the gain in the S&P 500 *with dividends included*. As Mr. Dyer said, the company promised the pilots "the Index result," that is, 37.2%, which was to replace the investment pool in the previous retirement plan. In fact, reinvestment of dividends had been the cornerstone of the minimum benefits formula from the inception of the 1972 Prior Plan.

On October 28, 1980, Mr. Malloy wrote a letter to Mr. Dyer in which he analyzed whether minimum benefit provisions would be triggered for a list of pilots provided by USAir. In performing this calculation, Mr. Malloy used the S&P 500 *with dividends reinvested*, and determined that the minimum benefit provisions would not be triggered.

In the 1990 period, when USAir tried to co-opt the Airline Pilots Association ("ALPA") into accepting its position on the inclusion of dividends, ALPA represented approximately five thousand pilots of USAir, only eight hundred or so of whom were eligible for coverage under the Prior Plan minimum benefit. Although USAir now claims that ALPA took the position that dividends should not be included, it is not so. At the December 13, 1989 meeting between ALPA representatives and USAir referred to earlier, ALPA took the position that dividends *should* be included. Mr. V.A. Bems, actuary for ALPA noted:

> The issues up for grabs are as follows:
>
> > The growth of the variable plan assets will be based on ". . . investment performance equal to the performance of the Standard and Poor's 500 Index." Some documents add in parentheses "unadjusted for dividends." It is Robert Haver's [of TPF&C] position that the S&P 500 Index (unadjusted for dividends) means that dividends are excluded from the calculation of the index. I feel that since all documents contain the words "investment performance equal to the performance of the Standard and Poor's 500 Index", (i) performance means dividends are part of the index, and (ii) "(unadjusted for dividends)" means that dividends will not be subtracted from performance of the Index. The impact of the choice is considerable.

If ALPA considered the matter at all, it did not request information from those who had been directly involved in the negotiations. By 1993 and 1994, the union had shifted

over to USAir's position on the inclusion of dividends in the calculation.

On October 9, 1993, Captain Donald Reubert, a member of the original negotiating team, notified ALPA that:

> The only way we differed between [the Delta Plan and USAir Plan] was that Delta had 120% and used 100% of the Standard and Poor's 500 investment performance. The wording of our contract made certain that *the benefit of the new plan would not be less than a pilot would receive under the old A and B plans,* with the variable part calculated according to the investment performance of the S&P 500 Index. The language did not mention dividends one way or another because it was not necessary, since the intent (as well as the wording) provided no lesser benefit than the Prior Plan which, in fact, reinvested dividends.

Despite this clear explanation, on February 2, 1994, the union informed the pilots that it would not pursue the matter and they would have to go to court themselves. Thus, it was made clear to the Prior Plan participants that the union opposed their efforts to obtain the bargained for retirement.

By April 1990, USAir had realized that the minimum benefit provisions would affect USAir's profits, in an amount then estimated at between 18 and 20 million dollars, even if dividends were excluded. If dividends were to be included, then the amount was estimated by TPF&C at between 122 million and 272 million dollars. To fend off the need to pay the retirement benefits negotiated in the

Prior Plan agreement, USAir began to build a "history" of the Prior Plan.

The company never presented ALPA with the figures, which had apparently been calculated, showing the shortfall if dividends were included. In the course of its review of the matter, Towers Perrin also considered the application of a number of different "conversion factors" to the calculation of the minimum benefit. In a letter to USAir, TPF&C noted that ALPA could insist on the use of a more current conversion rate of 9%, which would have added tens of millions of dollars to the minimum benefit. USAir did not disclose these conclusions to ALPA or the plan participants and beneficiaries, but instead included a proposed Letter Agreement with ALPA a provision which would have provided for the 3% rate, which was much more favorable to USAir and which would have deprived the participants of a benefit to which they were entitled. As outlined above, by 1994, the pilots' union had seen the threat to its current members if the Prior Plan was pegged to the investment performance of the S & P 500 Stock Index and saw the benefit to its current members in opposing the few Prior Plan union members and joining with USAir to defeat the benefits.

Thus, it is apparent that in both USAir and the union have an overarching interest in stacking any arbitration panel with arbitrators who will vote against the interests of petitioners.

REASONS FOR GRANTING THE WRIT

The significance of the award of retirement benefits is increasing for the individual as the impact of its system-

wide allocation becomes of great importance in the financial decisions of major corporations. In the instant case, petitioners are retired pilots or, in a handful of instances, pilots with over twenty-seven years experience with USAirways Inc. In 1972, all petitioners relinquished their interests in an actual stock pool and entered into a retirement agreement with then-tiny Allegheny Airlines, which provided for a floor for retirement benefits pegged to the investment performance of the Standard and Poor 500 Stock Index. This provision — referred to as "the Prior Plan" — has been preserved contractually to the present for the Prior Plan participants and is financed by respondent USAir.

As the years have passed, Allegheny Airlines grew through acquisitions and corporate expansion into the huge USAir conglomerate, which employs nearly ten times the number of pilots entering into the Prior Plan in 1972, whose active number of union member pilots has dwindled to about fifty. On the other hand, with expansion the fifty active Prior Plan participants now constitute about 1% of the USAir union members.

The central issue in the present controversy is which adjudicatory body shall determine whether the investment performance of the Standard and Poor 500 Stock Index means that dividends should be included or excluded when calculating the benefits multiplier. The relevant contractual language initially negotiated is "unadjusted for dividends." The evidence presented in the District Court by petitioners demonstrates that dividends were to be included in the agreement as negotiated by the Prior Plan pilots. As is clear, the USAir retirement plan was modeled on the Delta plan, which uses the dividends-included S & P 500 Investment Stock Index.

The economic effect on respondent USAir of the application of the dividends-included multiplier of the Prior Plan as originally negotiated ranges from $80 million to $200 million. This sum must come from the USAir contribution and will diminish the funds available to provide dividends to the USAir stockholders and to fund pay and retirement plans for the nearly five thousand union members who are not Prior Plan participants.

It has been held that this determination of the meaning in the Prior Plan of "unadjusted for dividends" — so important to the retired and older pilots — which will deprive USAir and the pilots' union of $80 million to $300 million and award that amount to petitioners, must be made by an arbitration panel selected by USAir and the pilots' union and that that procedure will not amount to a deprivation of due process.

Ruling on defendant USAir's Motion for Summary Judgment or to Dismiss, the District concluded based on Day, that it had no jurisdiction and, therefore dismissed Counts I and III, retaining jurisdiction over the ERISA count. That court applied *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959) contrary to its specific holding that it applied to an RLA process commenced while the plaintiff was still employed and that referred solely to work conditions. Here the retired pilot, who are unrepresented by the union and cannot bring a duty of fair representation suit against the union, are solely seeking retirement benefits. Moreover, if required to arbitrate under the RLA, they will have their issues decided by a four person panel selected by USAir and the union, both of which will suffer severe economic consequences if the panel finds favorably to petitioners in the central issue — whether dividends should be included in the investment performance of the Standard

and Poor 500 Stock Index. Thus, there will be inflicted on the 450 pilots participating in this claim a significant due process violation if the decision of the United States Court of Appeals for the District of Columbia is permitted to stand.

In addition, the appellate court refused to apply the rule in *Kaschak v. Consolidated Rail Corporation*, 707 F.2d 902 (6th Cir. 1983), which permits resort to the judicial system in the first instance — consistently with DFR cases — where there is an apparent violation of the union's duty of fair representation although a count formally charging the union is not included in the complaint.

Accordingly, certiorari should be granted because of the conflict of this decision with the Supreme Court in Day and the split in the circuits between this instant decision and *Kaschak* with respect to the necessity of joining the union in the complaint.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S DECISION IN *PENNSYLVANIA R.R. v. DAY.*

In its opinion, the District Court ruled, "Since plaintiffs' claims including those of the retired pilots, all arise out of their employment relationship with USAir, the RLA governs and the court lacks jurisdiction." This is erroneous.

The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, ("RLA") provides for the submission by employees of certain disputes to the employer up to and including the carrier's chief operating officer. 45 U.S.C. §§ 181-188. The word "employees" in the RLA is defined in § 153 of the

statute as "every person *in the service of a carrier*" [emphasis added), and therefore applies to those actually employed by the carrier.[1] The RLA further defines "employee" as requiring that the person be "subject to its [the employer's] continuing authority to supervise and direct the manner of rendition of his service." There can be no doubt that retired people, who are not covered by these definitions of employees, nor are they under USAir's supervision and direction are not included in the plain language of the statute. *Cf. Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984) (applicants for employment, since not employed, are not precluded from bringing suit). When interpreting the statute, courts need only look at the plain language; it is dispositive. It is well-recognized by ALPA and USAir that retired pilots are neither in the service of a carrier nor subject to its supervision and control. As such, they are outside the scope of the RLA. Congress well knew how to draft statutory language that included retirees: 45 U.S.C. § 351 uses the phrase "is or has been . . . in the service . . ."

Moreover, the purpose of the RLA's mandatory arbitration is to prevent employees in the transportation industries from striking, which could cripple the nation's economy. In the case of the retired pilots, a "strike" by them would not cripple the economy — indeed, nobody would notice it at all, since they are, by the RLA'a own terms, neither employees nor working. Nor could the few

1. The pertinent parts of § 184 are identical to § 153. Section 184 goes on to state, "Such boards of adjustment may be established by agreement between employees and carriers . . ." This section excludes retirees from the right to participate in the board selection process. Neither USAir nor ALPA has suggested that the retired pilots may participate in the board selection process.

remaining active pilots in the Prior Plan cause a strike by ALPA.

The case primarily relied on the District Court's opinion, *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), requires that retired pilots, unrepresented by their union, be treated identically to current employees on matters not related to the workplace or conditions of employment. Day filed his grievance while he was employed and following the procedure set forth in the RLA. His dispute had to do with pay and working conditions, which might affect the employer's workplace relations with active workers and the issues concerned matters which were peculiarly within the expertise of the board. The *Day* Court specifically limited its holding to case where "the employee has retired and seeks compensation for work performed while he remained on active service," and did not encompass issues solely related to retirement agreements and retired employees.

Not only are the retired pilots not within the definition of employees covered by the plain terms of the RLA, type of claims brought by appellants here is within the District Court's jurisdiction, and not the RLA's. That the District Court has subject matter jurisdiction over there claims is plainly set forth in the RLA itself:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of **an interpretation of agreements concerning rates of pay, rules, or working conditions** . . .

45 U.S.C.A. § 153(1)(i) (emphasis added).

The plain language of the statute states that the only disputes cognizable[2] by the RLA are those arising out of an interpretation of a bargaining agreement "concerning rates of pay, rules or working conditions." Here the dispute arises out of USAir's bad faith refusal[3] to use the proper index to calculate the variable benefit for the Prior Plan participants. There is no component of this calculation that constitutes a "rate of pay" for appellants or any other pilots at USAir nor does the calculation constitute a "rule" or a "condition of work".[4]

Rather, these are claims under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA") that certain benefits in the USAir Retirement Plan are due to the retired pilots. Thus, the calculation of the index by which the Plan Administrator determines retirement benefits for a small percentage of USAir pilots is not within the subject matter jurisdiction of the RLA for either retired pilots or the few Prior Plan participants still working.

That the selection of the proper stock index for the Prior Plan retirement benefit calculation is not the type of

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2. Grievances also may be subject to the RLA, but the retired pilots are not eligible to file grievances.

3. A reading of USAir's confidential memoranda makes it abundantly clear that USAir's and ALPA's bad faith is beyond cavil.

4. A whole section of the RLA, § 156, is devoted to the procedure in changing rates of pay, rules, and working conditions. From a perusal of § 156, two points stand out: retirees are not included in its consideration and there is no right or even a hint of a right that would include retirees in that procedure, either directly or through a representative.

determination committed to the exclusive jurisdiction of the RLA is seen in the Supreme Court's reasoning in *Pennsylvania R.R. v. Day,* 360 U.S. 548 (1959):

> We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Since nothing is a greater spur to the conflicts, and eventually to conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.

Id. at 553.

Unlike the determination of rate of pay and work conditions required in *Pennsylvania R.R. v. Day*, an adjudication by the District Court of USAir's bad faith refusal to calculate retirement benefits with the correct index would have no effect on uniform interpretation of the collective bargaining agreement — this being a unique situation — and it would not provide for "different pay for the same work or unfair differentials." The determination of whether Day was entitled to extra pay when he left his switching area involved working conditions and pay, which were peculiarly within the specialized technical knowledge and expertise of the System Board. The Supreme Court concluded:

> All of the considerations which led Congress to entrust an expert administrative board with the

> interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating *a claim for compensation for work performed while on active duty.* The nature of the problem and the need for experience and expert knowledge remain the same. [The considerations] are the same when the employee has retired and *seeks compensation for work performed while he remained on active service.*

(Emphasis added.) *Id.* at 552.

Since the retirement benefits language does not have anything to do the with "specialized technical knowledge" of pilots such as conditions of work, compensation for work or reinstatement, but applies solely to a determination more appropriately evaluated by an National Association of Securities Dealers arbitration panel, there is no sound reason to submit this matter to people skilled in flying airplanes.[5] Since the claims do not constitute pay for current pilots, rules relating to work, or working conditions under the express language of the RLA, its legislative history, or applicable case law, the claims are not subjects of the mandatory arbitration provisions of the RLA.

The care with which the Supreme Court set forth the limited circumstances in which a retiree could be required to arbitrate — when the retiree seeks compensation for work

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5. This was the import of Justice Douglas's dissent in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). Even under the majority opinion in *Andrews*, this district court would not lack jurisdiction, because Andrews deliberately retired to deprive the RLA of jurisdiction. This should not be used to create jurisdiction in the court.

performed while on active status — reinforces the thrust of the RLA's plain language that demonstrates that the RLA does not apply to appellants here. Accordingly, the District Court's reliance on *Pennsylvania R.R. v. Day* is misplaced.

None of the cases, which rely on *Pennsylvania Railroad v. Day*, 360 U.S. 548 (1959) opine that the word "employee," as used in the RLA, includes retired employees. None of those cases[6] discuss the plain language of the RLA, nor do they consider *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), which is on point with this case regarding retired employees.

Accordingly, to apply the RLA to a person seeking solely retirement calculations who was retired at the time the action was instituted would be contrary to the actual holding in *Pennsylvania R.R. v. Day* and the plain language of the RLA. Therefore, petitioners submit that the opinion of the Court of Appeals is contrary to this Court's opinion in *Day* and certiorari should be granted to review this.

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6. For example, *Alaska Air Line Pilots Association v. Alaska Airlines Inc.*, 735 F.2d 328 (9th Cir. 1984) and *Beard v. Carrolton Railroad*, 893 F.2d 117 (6th Cir. 1989). The District Court in this case alludes to *Allied*, but dismisses it without discussion by contending that *Pennsylvania R.R. v. Day* squarely held that the RLA's mandatory arbitration provisions apply to retired workers, without reservation.

II. THERE IS A SPLIT IN THE CIRCUITS OVER WHETHER UNION MEMBERS OR EX-UNION MEMBERS MUST FORMALLY JOIN THEIR UNION AS A DEFENDANT, WHERE THE POSITION OF THE UNION IS MANIFESTLY ADVERSE TO THE PETITIONERS AND THE UNION REPRESENTS VERY FEW OF THE PETITIONERS.

There are three situations where exhaustion under the RLA is not required before proceeding in court. Petitioners may proceed with their claims in court if any one of these exceptions are satisfied: (1) when the employer repudiates the private grievance machinery; (2) if the union breaches its duty of fair representation; or (3) where the administrative remedy would be wholly futile. *Glover v. St. Louis-S.F. R. Co.*, 393 U.S. 324, 328 (1969); *see also Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (1974) (citing *Glover*); *Griffen v. International U., United Automobile, A. & A. I. W.*, 469 F.2d 181, 183 (4th Cir. 1972); *Nemitz v. Norfolk & Western Railway Co.*, 436 F.2d 841, 849-850 (6th Cir. 1971). Petitioners have established that they meet all three exceptions.

Courts have found jurisdiction when employees bring a suit against their union alleging that their union has failed in its duty of fair representation (hereinafter "DFR"). Where a DFR count is joined, the District Court recognizes that the Board lacks jurisdiction and exhaustion is not required. *See Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) ("It is beyond cavil that a suit against the union for the breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts").

Although there is little question that ALPA's actions would support a DFR claim, if the retired pilots were union members, the District Court, believing that joining a DFR count is the only way for petitioners to overcome the RLA "exclusive" jurisdiction hurdle to judicial jurisdiction over the carrier, determined that the petitioners' failure to join the union gave jurisdiction to the Board. The District Court ruled that petitioners "cannot invoke the jurisdiction of this Court based on a hypothetical unpursued claim where the limits on federal court jurisdiction under the RLA are so clear."

An examination of USAir's, and, more importantly, ALPA's adverse relationship with petitioners demonstrates that petitioners — at least the retired pilots — are not covered by the perceived bar in *Pennsylvania R.R. v. Day*. Since they are not, the District Court's conclusion that *Pennsylvania R.R. v. Day* prohibits a finding that retired pilots can be a structural minority, otherwise entitled to be excepted from the mandatory arbitration provision of the RLA, is erroneous.

In affirming the District Court the Court of Appeals relied on *Air Line Pilots v. O'Neill*, 499 S. Ct. 65 (1991) as a standard for evaluating fair representation that has not been violated here. However, that case involved an apparently disadvantageous settlement to certain striking pilots in negotiations with the employer. In this case, there is no duty of representation to the retirees so that they have no standing to bring a DFR suit. Second, where there are allegations of the nature made here that the union is in league with the employer, a DFR claim need not be filed. *See Kaschak v. Conrail*, 707 F.2d 902 (6th Cir. 1983).

In *Kaschak v. Consolidated Rail Corporation*, 707 F.2d 902 (6th Cir. 1983), plaintiff had been an employee of

Conrail, but claimed he had been wrongfully discharged. He claimed to have filed a timely request for grievance procedures, but that his union had failed to process the grievance in accordance with the time requirements in the bargaining agreement. Despite Kaschak's claims of improprieties on the part of his union and Conrail, his action was filed solely against Conrail for violations of the bargaining agreement. After the trial court's dismissal, the Sixth Circuit conducted a full review of the RLA framework and interpretive case law and decided that under the circumstances Kaschak's claim fell outside the normal statutory scheme and that relegating him solely to a Board-administered remedy would only serve to undermine the compensatory principle underlying not only the RLA, but all labor relations schemes. *Kaschak*, 707 F.2d at 908. *See also Miklavic v. USAir*, 21 F.3d 551 (3d Cir. 1994).

Among factors[7] found determinative in *Kaschak* were the employer's duty to act in accord with the terms of the

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7. The *Kaschak* court pointed out that the "RLA contemplates the presence of three entities: the employer, the individual employee and the union as representative of the collective employees." *Kaschak* at 909-910. It further stated that the rights of each are not co-extensive and that absent separate enforcement rights, there would be no check on possible collusion between the employer and the union to the detriment of all of the individuals. *Id.* at 910. In the instant case, it is unquestionable that the union and the carrier are arrayed against all appellants. Despite this situation, the District Court, feeling itself bound by its reading of *Pennsylvania R.R. v. Day*, based its dismissal partially on the absence of a count against ALPA for failure of its duty of fair representation. *Kaschak* recognizes that the claims against the union are sufficient to permit the court to have jurisdiction even without a DFR count. Perhaps more importantly, *the retired pilots have no cause of action for*

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agreement, the unquestioned capacity of the courts[8] to enforce the employer's obligation, and whether a denial of jurisdiction in the court would prove the rights of the employee under the RLA to be illusory. In the instant case, it was futile for appellants to seek to exhaust their administrative remedies and to deny them access to the court is to make their rights illusory and deprive them of a meaningful decision fairly arrived at.

Both USAir and ALPA are openly and unequivocally adverse to the appellants' position and have stated as much: the company because tens of millions of dollars of its money are at stake if dividends are included in the Prior Plan calculation, and ALPA because the Prior Plan pilots are a small group of mostly retired pilots (whom they do not represent) and payment to them would diminish benefits available to presently employed pilots who comprise nearly all of its membership. *See Licensed Division District No. 1 MEBA/NMU AFL-CIO v. Defries*, 943 F.2d 474 (4th Cir. 1991).

USAirways, Inc., with over 5,000 active pilots, cannot be relied upon to represent the interest of the retired pilots

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DFR against ALPA because the union has no duty at all toward them. Since most of the appellants cannot allege a valid DFR count against ALPA, to deny access to the court because of this impossibility is a clear denial of due process of law.

8. In the instant case, it is improbable that a Board comprised of airline pilots — experts in flying and perhaps the operation and working conditions of an airline — has expertise in and is more capable of dealing with a securities issue than a court which deals with issues of ERISA benefits and stock market performance indices on a regular basis.

and about fifty still-active pilots who worked under a contract applying, by its terms, only to them. Significantly, the inability of retirees to obtain any semblance of a fair hearing was so clear that USAir admitted in its Answer and in Interrogatories that the arbitration process would be futile.[9] The Union, of course, has neither incentive nor requirement to fairly represent these former pilots, who are neither union members nor eligible to become union members, and whose interests are, in fact, adverse to present union members.

When the circumstances here are considered, it is manifest that any efforts by petitioners to proceed formally with contractual or administrative remedies would be wholly futile. Accordingly, jurisdiction is properly found in the courts for petitioners' causes of action. Since the decision here directly conflicts with the decision in *Kaschak*, certiorari should be granted to resolve this conflict in the circuits.

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9. The complaint alleges in paragraph 3 that resorting to the Retirement Board would be futile. Defendants' Answer admits in paragraph 3 that it would be futile. A clearer statement of futility, agreed upon by all parties who are familiar with the composition of the Board, could not be had.

III. PETITIONERS WERE DENIED THEIR DUE PROCESS RIGHTS TO A FAIR HEARING BY AN IMPARTIAL TRIBUNAL WHERE THE RAILWAY LABOR ACT REQUIRED THAT PETITIONERS' RETIREMENT BENEFITS BE DETERMINED BY AN ARBITRATION PANEL CHOSEN BY THE EMPLOYER AND A UNION WHOSE INTERESTS WERE ADVERSE TO THE PETITIONERS' AND WHICH NO LONGER REPRESENTS MOST OF THE INDIVIDUAL PETITIONERS.

An award by the Retirement Board is final, and is not a private matter of contract, but rather is mandated by §§ 143 and 184 of the RLA. Such a mandatory imposition of the authority of the Retirement Board renders its acts government action of a judicial nature and, therefore, subject to constitutional due process requirements. *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616 (1959); *Pennsylvania Railroad Co. v. R.R.*, 352 U.S. 480 (1957) (recognizing that the decisions of the Boards are subject to review on due process ground).[10] The right to a fair and impartial tribunal is one of the most basic of due process

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10. This due process requirement is universally recognized by the Federal Courts of Appeal. *See, e.g., English v. Burlington Northern R.R. Co.*, 18 F.3d 741 (9th Cir. 1994); *Holly v. Eastern Airlines Inc.*, 511 F.2d 663 (5th Cir. 1963); *Steffans v. Brotherhood of Railway Airline and Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986); *Hornsby v. Dobard*, 291 F.2d 483, 487 (5th Cir. 1961); *D'Elia v. New York, New Haven & Hartford R. Co.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F.2d 701 (2nd Cir. 1964); *Edwards v. Capital Airlines, Inc.*, 176 F.2d 755 (D.C. Cir. 1949); *Elmore v. Chicago & Illinois Midland Railway Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

rights. As stated in *In re Murchison*, 349 U.S. 133, 136 (1956):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.**

Offutt v. United States, 348 U.S. 11 (1954) (emphasis added).

With respect to the RLA, the Fifth Circuit has held that a Railroad Labor Board decision under the RLA could be challenged on the grounds that the agreement between the union and the carrier might justify an inference of bias or partiality by reason of interests which would deny the petitioners the fair and impartial tribunal required by the due process clause of the Fifth Amendment. *Hornsby v. Dobard*, 291 F.2d 483, 487 (5th Cir. 1961).

The USAir-ALPA controlled Board makes the above-noted violations of due process appear even-handed forums by comparison. The USAir-ALPA Board will have four members (actually all of the members because there can be no deadlock requiring a fifth, "impartial" member) employed by USAir and ALPA, paid for their services on the Board by USAir and ALPA, possessed of deep-seated financial interests adverse to petitioners, and with no possibility of sanction by the retirees, such as in a union election. The Board is bought and paid for by USAir and ALPA. The alignment designed by Congress to be

structurally adverse, to grapple with work conditions and rates of pay by the opposing interests, simply does not exist here because the intended adversaries — the carrier and the union — are not adverse. In short, petitioners have no chance. This is not some speculative paranoid worldview, but is the considered opinion of USAir, ALPA, petitioners and the District Court.

It is not required that the board be impartial and disinterested, rather it is set up to be *bipartisan*. *Ferris v. Alaska Airlines, Inc.*, 113 F. Supp. 907, 910 (W.D. Wash. 1953); *see generally Union Pacific Railroad v. Sheehan*, 439 U.S. 93 (1978). In the instant case, however, it is not bipartisan, but is to be selected by two parties antagonistic to petitioners. Both ALPA and the airline have enormous economic interests in denying proper benefits to the unrepresented retirees. It cannot be denied, even by the most hardened cynic, that awarding judges millions of dollars — as will occur here by the selection of arbitrators — for their decision, is not corrupt. This type of corruption must be that contemplated in *Sheehan*.

Other courts have found that the denial of due process is a separate and independent ground. In *Edelman v. Western Airlines, Inc.*, 892 F.2d 839 (9th Cir. 1989), a flight attendant raised the claim that the procedure before the board deprived her of procedural due process. The *Edelman* court was quick to analyze *Sheehan* to determine that a due process challenge does provide an independent basis for the court's jurisdiction. *Accord Steffens v. Brotherhood of Railway Airline and Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986) and *Hayes v. Western Weighing*, 838 F.2d 1434 (5th Cir. 1988); *contra Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985).

It is a "well established principle that when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99 (1977). Having concluded that neither the RLA nor its legislative history foreclosed judicial review of constitutional claims, the *Edelman* court held that a constitutional challenge constituted a ground, separate from those set forth in *Sheehan*, upon which a federal court has jurisdiction to review decisions of a board. *Edelman*, 892 F.2d at 842.

The court then considered what sort of process was due. Starting with the proposition that "Due process is flexible and calls for such procedural protections as the particular situation demands" *Matthews v. Eldridge* 424 U.S. 319 (1976). The *Edelman* court considered claimant's interest in the outcome the government's interest in having disputes settled efficiently as follows:

> The Board itself is structured to protect the interests of a grievant like *Edelman*. The presence of two Union members of the Board helps ensure that the interests of a fellow Union member will be protected and that grievance proceedings will be conducted fairly . . . That is especially true here where *Edelman* was represented by a member of the Union as well as by her attorney.

Petitioners here will have no such protection nor will they have a tribunal that may protect their interests.

This view is supported by *Haney v. Chesapeake & Ohio Railroad*, 498 F.2d 987 (D.C. Cir. 1974), in which the court

considered the retroactive application of *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), to a separation pay dispute. The *Haney* court conducted a reasoned analysis of the facts to assure that no injustice was presented. Indeed the court noted that "Justice requires a fair tribunal," although it found in Haney's case that his particular claims of lack of fairness were weak and speculative.

Here both union and employer have taken a position in favor of their own economic interests, which are adverse to petitioners. There can be no fair tribunal for petitioners when their foes pick both sides of an intended bipartisan panel.

Finally, the issue in this case is unique and very likely applicable only to the Prior Plan participants. There is little likelihood that this issue could ever arise again between USAir and ALPA. The circumstances in this case are so egregious and it is so apparent that no board selected by USAir and ALPA can be a fair tribunal with respect to these issues, that the absolute denial of a fair tribunal should require this Court to grant the petition for certiorari and find jurisdiction in the District Court.

CONCLUSION

The denial of petitioners' rights to have a fair hearing on matters significant to them, which cannot be justly resolved in an arbitration controlled by petitioners' two adversaries — the company and the union — violates long-settled principles of fundamental fairness. The petition for a writ of certiorari should be granted and the split of authority between the circuits and with the decisions of this Court should be resolved.

Respectfully submitted,

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